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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 938

STATE OF LOUISIANA, ET AL., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Rules of this Court, the United States of America moves that the judgment of the district court be affirmed.

QUESTIONS PRESENTED

Upon promulgation of the Voting Rights Act of 1965, 79 Stat. 437 *et seq.*, 42 U.S.C. (Supp. I) 1973 *et seq.*, the Attorney General certified that the State of Louisiana maintained on November 1, 1964, a test or device within the meaning of Section 4(c) of the Act, 42 U.S.C. 1973b(c), and the Director of the Census certified that less than 50 per centum of the persons of voting age residing in Louisiana voted in the presi-

dential election of November 1964. The Act thereby having been made applicable to Louisiana, no person therein could any longer be denied the franchise for failure to comply with any "test or device" (§4, 42 U.S.C. 1973b), and the Attorney General was authorized to direct the assignment of federal examiners (and also, in that event, observers) to any subdivision as necessary (§§ 6, 8, 42 U.S.C. 1973d, 1973f). Examiners were in fact appointed to serve in six parishes in Louisiana,[1] and, from time to time, federal observers also have been appointed to watch the elections in these parishes. Against this background, the questions presented are:

1. Whether the accuracy of the determinations of the Attorney General and the Director of the Census, which "triggered" Louisiana's coverage by the Voting Rights Act, are judicially reviewable.

2. Whether it is improper for examiners to list as eligible to vote persons who will reach age 21 by the next election.

3. Whether it is improper for the examiners to use application forms which fail to elicit personal data from applicants for listing ostensibly to be used for identification (such as their race and mother's maiden name), which have no bearing on their qualification to vote; and whether State election officials may refuse to permit federally-listed persons to vote because such information as to them is not transmitted on the examiners' lists.

4. Whether the court below properly enjoined enforcement of LSA–R.S. 18:350, insofar as it pro-

[1] Madison, East Carroll, East Feliciana, West Feliciana, Plaquemines, and Ouachita Parishes.

hibits rendering assistance to illiterates at the polls, and properly directed election officials to render such assistance.

5. Whether federal observers may properly be present within the voting places and may, upon request of an illiterate voter, observe the assistance rendered by State officials to him in casting his ballot.

STATEMENT

This is an appeal from a final judgment entered by a three-judge district court in the Eastern District of Louisiana convened pursuant to 28 U.S.C. 2281. The relief sought by the original complaint was an order enjoining the enforcement of Article VIII, Section 1, of the Louisiana Constitution and implementing statutes, insofar as these provisions required the registration application form to be used as a test, which, if completed incorrectly, disqualified the applicant for registration.[2] The allegation was that the use of that particular application form as a test for registration violated the Fourteenth and Fifteenth Amendments.

On November 30, 1964, the court below heard the case on the merits, but no decision had been rendered by August 6, 1965, when the President signed into law the Voting Rights Act, 42 U.S.C. 1973 *et seq.*. On the latter day, pursuant to Section 4(b) of the Act (42 U.S.C. 1973b(b)) the Attorney General determined that the State of Louisiana on November 1, 1964 maintained a test or device within the meaning of Section

[2] The United States also requested relief aimed at prohibiting racial discrimination in the registration process in the State of Louisiana.

4(c) and, on the same day, the Director of the Census certified that less than 50 per centum of the persons of voting age residing in Louisiana voted in the presidential election of 1964. The determination of the Attorney General and the certification of the Director of the Census became effective on August 7, 1965 upon publication in the Federal Register. 30 Fed. Reg. 9897. On August 9, 1965, in accordance with Section 6 of the Voting Rights Act, 42 U.S.C. 1973d, the Attorney General certified that in his judgment the appointment of examiners was necessary to enforce the guarantees of the Fifteenth Amendment in East Carroll, East Feliciana and Plaquemines Parishes, Louisiana. 30 Fed. Reg. 9971. On August 18, 1965 and on October 29, 1965, the Attorney General made like certifications with respect to Ouachita and West Feliciana Parishes. 30 Fed. Reg. 10863, 13849. Federal examiners went on duty in each of the parishes named in the Attorney General's certification. By the end of November 1965 the examiners in the five parishes had listed more than 13,000 persons as eligible to vote and had transmitted the names of persons so listed to the appropriate parish registrars, who, pursuant to Section 7(b) of the Voting Rights Act, 42 U.S.C. 1973e(b), were required to place the names on the official state voting lists.

In the meantime, defendant Gremillion brought suit in the State courts against defendant Manning, the Registrar in East Carroll Parish; defendant Perez brought suit against defendant Lyons, the Registrar of Plaquemines Parish; and defendant Lassiter brought suit against defendant Lucky, the Registrar of Ouachita Parish. Orders were issued in each of

these State court suits enjoining the respective registrars from placing on the official State voting lists the names of persons listed and transmitted to them by the federal examiners. The registrars in all five of the parishes—including the two parishes in which there was no State court injunction—refused to place on the official voting lists the names of persons listed and transmitted by the examiners.

On November 15, 1965, the United States filed a supplemental complaint and a motion to add and drop parties.[4] The supplemental complaint, based on the Voting Rights Act, sought an injunction requiring the named registrars to place on the official State voting lists the names of persons listed and transmitted by the examiners and asked the court to set aside the State court injunctions prohibiting parish registrars from giving full force and effect to the lists of eligible voters transmitted to them by the examiners. The United States also requested an injunction restraining the defendants and their agents from giving any force and effect to the provisions of Article VIII, Sections 1 and 18, of the Constitution of Louisiana, and Sections 31(2), 32, 36, and 191A of Title 18 of the Louisiana Revised Statutes, insofar as these pro-

[4] Jack Gremillion, Attorney General of the State of Louisiana, Alvin P. Lassiter, District Attorney for the Fourth Judicial District, Mae Lucky, Registrar in Ouachita Parish, L. H. Perez, District Attorney for the Twenty-fifth Judicial District, Roy Lyons, Registrar in Plaquemines Parish, and Cecil Manning, Registrar in East Carroll Parish, were added as parties. The Board of Registration and its members named in the original complaint were dropped. The Board is charged with the duty of regulating voting registration and prescribing the forms to be used in the registration process. The State was maintained as a party.

visions require an applicant for registration to demonstrate his ability to read and write or his understanding of the duties and obligations of citizenship or to complete an application form without assistance.

The defendants' answer challenged the constitutionality of the Voting Rights Act, the determination of the Attorney General that Louisiana maintained a test or device, the certification of the Director of the Census that less than 50 per centum of the persons of voting age residing in Louisiana voted in the presidential election of 1964, and the Attorney General's certification that examiners were necessary in the five parishes to which they had been assigned. In addition, the defendants contended that the examiners were listing persons who did not meet Louisiana's age and residence requirements and had refused to furnish registrars with identification information such as race, color of eyes, mother's maiden name, occupation, sex, and name of employer.

The court below, relying on this Court's decision in *South Carolina* v. *Katzenbach*, 383 U.S. 301, rejected all the defendants' arguments, except the contention that the examiners had made a minor technical error in applying the Louisiana residence qualification.[4] The court thereupon ordered the defendants and their agents to place on the official voting lists the names of persons listed and transmitted by the examiners,

[4] The United States was ordered to contact persons listed who had not met the residence requirement as of the date of listing and to remove from the eligibility lists those who, by the date of the court's order, no longer resided at the address given at the time of listing. This order has been complied with.

notwithstanding the contrary State court injunctions, which were held void. The court further ordered the defendants and their agents to provide assistance to each voter who, because of inability to read or write, needed assistance at the polls.[5]

The following day the court amended its order, particularizing the manner in which assistance was to be given voters who were unable to read or write. In brief, the order provides that the commissioner of elections selected by the voter, who declares under oath that he is unable to read or write, is to ascertain the wishes of the voter and cast the voter's ballot accordingly. The commissioner is also required to advise the voter whom he is to assist that an observer will observe the assistance he renders, if the voter so desires. On August 12, 1966, the court issued another order clarifying its prior order. The order of clarification enjoined the defendants and their agents from interfering with federal observers (appointed under Section 8 of the Act, 42 U.S.C. 1973f) exercising any of the powers or performing any of the duties vested in them by the Act. Specifically, they were enjoined from preventing federal observers from observing the assistance provided to voters who are unable to read or write. Under the order observers are permitted to go behind the curtains of the voting machine to observe

[5] The court had found that Louisiana Act 499 of 1960, amending LSA–R.S. 18:350, which prohibited assistance to be given to persons unable to read or write in the casting of their votes, was in conflict with the Voting Rights Act. Judge West dissented from this part of the court's decision.

the assistance rendered only when requested to do so by the voter.*

ARGUMENT

1. Louisiana argues that it is not within the coverage formula of Section 4(b) of the Voting Rights Act † because more than 50 percent of its citizens voted in the Presidential election of November 1964. The short answer is that the Director of the Census has made a determination to the contrary. The State's argument amounts to a challenge to the Director's determination—a challenge which no court is permitted to entertain. Indeed, Section 4(b) expressly provides

* Although the court below enjoined the enforcement of a State constitutional provision and implementing statutes without invoking a substantive provision of the Constitution (see *Swift & Co.* v. *Wickham*, 382 U.S. 111), it nevertheless had jurisdiction under 28 U.S.C. 2281 to render the decision from which the defendants appeal. The United States in its original complaint requested an order enjoining the enforcement by State officials of certain State constitutional and statutory provisions on the ground of their inconsistency with the Fourteenth and Fifteenth Amendments. Since the three-judge court might have premised its decision on the Constitution, it had jurisdiction of the case even though it ultimately granted relief on Supremacy Clause grounds alone. *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73. Thus an appeal properly lies to this Court.

† Section 4(b) provides:

"The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964."

* * * * *

that the determination of the Director of the Census "shall not be reviewable in any court. * * *" The legislative history is equally clear. See *H. Rep. No. 439*, 89th Cong., 1st Sess., at 25; *S. Rep. No. 162*, 89th Cong., 1st Sess., Part 3, at 22. Moreover, in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 332–333, this Court upheld the constitutionality of this withdrawal of judicial review and expressly rejected the argument that this "provision is invalid because it allows the new remedies of the Act to be imposed in an arbitrary way."[8]

In any event, Louisiana's challenge to the certification of the Director of the Census is baseless.[9] It was stipulated that the Director determined that 1,893,000 persons of voting age (21 years and over) resided in

[8] This Court said (at 383):

"* * * The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see *United States* v. *California Eastern Line*, 348 U.S. 351; *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297. In this instance, the findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4(b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review."

[9] Louisiana does not appear to be seriously urging its claim below that the Attorney General erred in determining that Louisiana maintained a test or device within the meaning of Section 4(c). The fact is that Louisiana maintained every test or device mentioned in Section 4(c) of the Act, and more than one of some of them.

Louisiana on November 1, 1964 and that 896,293 persons voted for President in the Presidential election of 1964. Thus, it was stipulated that the Director determined that 47.3% of Louisiana's voting age population voted for President in the Presidential election of 1964. To be sure, the Director did not count the more than 45,000 persons who voted in the general election at which Presidential electors were chosen but who did not vote for a presidential candidate. But the legislative history is clear that by "presidential election" Congress meant the vote cast for candidates for President and Vice-President (or electors therefor). As the House Report states (*H. Rep. No. 439*, 89th Cong., 1st Sess., at 25):

> The Director of the Census must determine that less than 50 per centum of the persons of voting age residing in any State * * * voted in the presidential election of 1964. *The vote in the presidential election of 1964 is the vote cast for the presidential candidates.* * * * [Emphasis added.]

See the Senate Report for a similar statement. *S. Rep. No. 162*, 89th Cong., 1st Sess., Part 3, at 23.

Louisiana also objects to the Director's inclusion in the figure representing total voting age population of classes of persons ineligible to vote, such as convicted felons and out-of-State military personnel stationed in Louisiana. But, again, the Director did what Congress intended—he included all persons of voting age in his computation. Congress rejected an amendment to the Act's triggering clause which would have required the Director to exclude from total vot-

ing age population some classes of persons ineligible to vote, specifically aliens and persons in active military service and their dependents.[10] See the bill reported out of the Senate Judiciary Committee, 111 Cong. Rec. 7801–7804, amended 111 Cong. 11752–11755.

Finally, and conclusively, it is clear that Congress contemplated that the Director would base his computation on the figures he used. Indeed, in the computation underlying his certification which resulted in subjecting Louisiana to the Act, he used the identical figures submitted to the Congress by the Attorney General and the Census Bureau while the bill was being considered—figures on which the Congress relied in determining which states the bill would cover. See *Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, on H.R. 6400,* 89th Cong., 1st Sess., at 29; *Hearings before the Senate Committee on the Judiciary on S. 1564,* Part 2, 89th Cong., 1st Sess., at 1459. The fact is that Louisiana's argument amounts to saying that Congress did not intend the Act to cover Louisiana—an untenable claim in light of that State's position as a violator of the Fifteenth Amendment. See *Louisiana* v. *United States,* 380 U.S. 145; *S. Rep., supra,* at 47.

2. Louisiana objects to federal examiners listing persons who will reach their twenty-first birthday by the date of the next election (and who otherwise possess the qualifications established by Louisiana). But

[10] Even under such a triggering clause, Congress intended to cover Louisiana. See *S. Rep. No. 162, supra,* at 52.

this is in exact accord with State law (LSA–R.S. § 18:31 (1965 Cum. Supp.)) which provides:

> Every citizen of the United States and Louisiana, native born or naturalized, who is 21 years of age or *who will have attained the age of 21 years prior to the next election* and who * * * [is otherwise qualified] shall be eligible for registration as a voter. [Emphasis added.]

See, also, Article VIII, Section 1, of the Louisiana Constitution. Not only is the text of the statute clear, but the Louisiana Court of Appeal in *Perez* v. *Rhiddlehoover*, 186 So. 2d 686, 691 (1966), upheld the construction placed on the statute by the examiners.[11]

3. Louisiana claims that the examiners erred in not eliciting certain information from applicants, allegedly designed to facilitate identification of the voter at the polls. Article VIII, Section 1(e), of the Louisiana Constitution requires a person attempting to vote to "be able to establish that he is the identical person whom he represents himself to be when applying for registration, and when presenting himself at the polls for the purpose of voting in any election or

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[11] The court said:

"The preamble to Act 197 of 1962 [LSA–R.S. § 18:31] states that it is an Act 'to permit the registration of persons under the age of 21 years who will attain the age of 21 years prior to the next election.' This, in conjunction with the language embodied in the Act itself which stipulates that a person twenty-one years of age 'or who will have attained the age of 21 years' shall be eligible for registration as a voter, leaves no doubt in our minds that the legislature fully intended to provide for the registration in the future of persons who will have attained the age of twenty-one years prior to the next election."

primary election." To facilitate identification of the voter LSA-R.S. § 18:235(2)(A)(k) provides that the registration form shall contain spaces for the following data: date of birth, place of birth, mother's first or maiden name, color of eyes, sex, race or color, occupation, and whether owner, tenant, boarder or other. The form which the examiners use contains space for listing the applicant's date of birth, but does not elicit the other data mentioned above.[11]

Pursuant to Sections 7(a) and 9(b) of the Voting Rights Act, the forms and procedures for listing are to be prescribed by the Civil Service Commission. And it is only with respect to State voting "qualifications" that State law is to control. Section 9(b), 42 U.S.C. 1973g(b), provides;

> The times, places, procedures, and form for application and listing pursuant to this Act * * * shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing * * *.

The House Report confirms what is explicit in the text. Referring to Section 9(b), the Report explains (*H. Rep. No. 439*, 89th Cong., 1st Sess., at 29):

> While relevant State substantive laws not incon-

[11] The listing forms have since been changed to elicit whether the applicant is "Mr.", "Mrs.", or "Miss", thus providing information as to the sex of the applicant.

> sistent with Federal law will be applied, *State laws relating to registration procedures need not be followed by examiners. It is expected that the application form will be simple.* [Emphasis added.]

Since information with respect to an applicant's place of birth, mother's first or maiden name, color of eyes, sex, race or color, occupation, and whether owner, tenant or boarder, has nothing to do with determining the applicant's qualification to vote, it need not be elicited or transmitted to the State election officials.[13]

Nor is there a practical difficulty involved. The information forwarded to the respective registrars by the examiners is more than adequate to enable a person listed by an examiner to identify himself at the polls. In our view what was said by the court below fully disposes of the matter.[14]

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[13] While Louisiana does not suggest in the Jurisdictional Statement which voting requirements federal examiners are allegedly misapplying (J.S. 16), the two discussed above—Louisiana's age and identification requirements—are the only ones in dispute following the lower court's decision.

[14] The court below said (Pet. 51):

"The Eligibility List of federally registered voters are sent to each parish registrar and they contain the following descriptive information—name, address, certificate of eligibility number, date of application, age of the applicant, ward and precinct. The certificate of eligibility to vote, which the applicant is given, contains a number (these certificates are numbered consecutively) and lists of the name, address, state, parish, ward, precinct, and date of application of the voter. The certificate also has on it the signature of the applicant (which must be affixed in the presence of the federal examiner) and has on it the signature of the examiner.

"Thus, when a person presents himself at the polls, the commissioner may check the number and name on his certificate

4. The court properly enjoined enforcement of Louisiana Act 499 of 1960, amending LSA–R.S. 18:350, insofar as it prohibited commissioners of elections to render assistance to voters who are unable to read or write. Since the Voting Rights Act provides that "no citizen shall be denied the right to vote" in any election for failure to pass any literacy test (§ 4(a)), it follows that Congress intended that illiterates shall be registered to vote. This was expressly recognized by this Court in *South Carolina* v. *Katzenbach, supra,* at 334, and so held by the Court of Appeals for the Fifth Circuit in *Dent* v. *Duncan,* 360 F. 2d 333, and another three-judge court in *United States* v. *Mississippi,* 256 F. Supp, 344, 347 (S.D. Miss.). The legislative history leaves no doubt on this score. See, *e.g., Hearings Before Subcommittee No. 5 of the House Judiciary Committee on H.R. 6400,* 89th Cong., 1st Sess., pp. 16–17 (statement

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to see if it corresponds to the number and name certified on the eligibility lists. He may check to make sure that address, precinct, ward and date of application correspond properly from the certificate to the list. He may require the applicant to sign his name and compare his signature to the signature on the certificate. If he is still not satisfied, he may ask the applicant his age and look at the applicant to see if he is likely to be younger or older than the age which the examiner has certified him to be. (The voter's age is *not* contained on the certificate but is contained on the eligibility lists, so that an applicant asked his age would not have before him the answer to that question, and could not know the answer unless he is the person he represents himself to be.)

"If the applicant does not have his certificate and there is some doubt about his identity he may obtain a duplicate at the Office of the Federal Examiner which is open on the day of every election and for 48 hours thereafter."

of the Attorney General Katzenbach); *Hearings Before the Senate Committee on the Judiciary on S. 1564,* 89th Cong., 1st Sess., pp. 22–23 (statement of Attorney General Katzenbach); 111 Cong. Rec. 8481 (Senator Bayh).

Congress having intended to enfranchise illiterates, a State law denying them assistance must fall, else the granted right is not effective—contrary to the express direction of Congress. See Section 14(c)(1), 42 U.S.C. 1973*l*(c)(1). Thus State officials who fail to render assistance necessarily violate the Act. As the court below said (Pet. 34, 53):

> We cannot impute to Congress the self-defeating notion that an illiterate has the right to pull a lever of a voting machine, but not the right to know for whom he pulls the lever.

See, also, *United States* v. *Mississippi,* 256 F. Supp. 344, 348 (S.D. Miss., three-judge court).[15]

5. The powers and duties of federal observers are derived from Section 8, 42 U.S.C. 1973f. Observers are, *inter alia,* "to enter and attend at any place for

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[15] In *United States* v. *Mississippi, supra* at 349, the court's declaratory judgment read:

* * * * *

"It is the duty and responsibility of the precinct officials at each election to provide to each illiterate voter who may request it such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision."

* * * * *

holding an election * * * for the purpose of observing whether persons who are entitled to vote are being permitted to vote * * *." "Vote" being defined as "all action necessary to make a vote effective" including "casting a ballot, and having such ballot counted properly" (§ 14(c)(1), *supra*), it seems plain that an observer must be permitted to watch persons assisting illiterates in marking their ballots if the observers are to carry out their statutory mandate. There is no countervailing interest to protect where, as provided by the order of the court below, such observation is limited to instances where the voter requests it.[16] The lower courts have uniformly so held. See *United States* v. *Executive Committee of the Democratic Party of Greene County, Alabama,* 254 F. Supp. 543 (S.D. Ala.); *United States* v. *The Executive Committee of the Democratic Party of Clarendon County, South Carolina,* Civ. Action No. 66–459 (D.C.S.C., decided June, 1966). And in light of the history of practices in Louisiana which have disfranchised Negroes in the past and the likely reluctance of illiterate Negroes there to assert their rights, it is wholly appropriate to require, as the court below and other courts have done, that State election officials advise illiterates of their right to have a federal observer watch the assistance given them by the local official.

[16] The order provides that the commissioner and the observer are not to make known the way an assisted voter casts his ballot.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LOUISIANA ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 938. Decided March 13, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for hearing.